(13)

No. 97-1235

In the Supreme Court of the United States

OCTOBER TERM, 1997

CITY OF MONTEREY, PETITIONER

v.

DEL MONTE DUNES AT MONTEREY, LTD., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER IN PART

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QUESTIONS PRESENTED

The brief for the United States will address the following questions:

1. Whether the "rough proportionality" standard set forth in *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), which was established to review a permit condition that required the permittee to dedicate property to the public, applies to a restriction on the use of land that does not entail a dedication.

2. Whether the court of appeals erred in sustaining the jury verdict in this case on the ground that a reasonable jury could have credited respondents' evidence and discredited that proffered by the City, and could on that basis have concluded that the City's regulatory action bore an insufficient nexus to a legitimate governmental purpose.

3. Whether a land-use restriction that does not substantially advance a legitimate public purpose can be deemed, on that basis alone, to effect a taking of property requiring the payment of just compensation.

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INTEREST OF THE UNITED STATES

This case concerns a challenge under the Just Compensation Clause of the Fifth Amendment to a city's denial of a development permit. The permit denial was based in part on the city's conclusion that the development would damage habitat of the Smith's Blue Butterfly, a species listed as endangered under the Endangered Species Act of 1973 (ESA). Although the permit was not denied under the authority of the ESA, the United States has an interest in ensuring that local land-use officials have the flexibility to take reasonable measures under state and local law to protect endangered species.

More generally, this case raises important issues regarding the circumstances under which government

action may give rise to liability under the Just Compensation Clause. The federal government administers many programs that restrict the use of private property in order to protect human health, public safety, the environment, and other vital interests. The United States has an interest in the sound development of takings jurisprudence in cases that may affect its ability to implement those programs consistent with constitutional protections for private property.[1]

STATEMENT

1. The property at issue in this case consists of 37.6 oceanfront acres in Monterey, California. See *Del Monte Dunes* v. *City of Monterey*, 920 F.2d 1496, 1499 (9th Cir. 1990) (*Del Monte I*). The property's native flora includes

[1] The United States has no direct interest in whether respondents have a statutory or constitutional right to jury trial in this inverse condemnation action. The statute under which respondents' suit was brought is not available to challenge the exercise of federal regulatory authority, since it applies only to persons acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia." 42 U.S.C. 1983. And "[i]t has long been settled that the Seventh Amendment right to trial by jury does not apply in actions against the Federal Government." *Lehman* v. *Nakshian*, 453 U.S. 156, 160 (1981); see also *United States* v. *Reynolds*, 397 U.S. 14, 18 (1970) (no constitutional right to jury in eminent domain proceedings). The United States has a substantial interest in continued recognition of the principle that no Seventh Amendment right to jury trial exists either in suits against the United States or its agencies, or in eminent domain actions brought by the federal government. Neither respondents nor the court of appeals, however, has called that principle into question. See Resp. C.A. Br. 17 ("The City is correct that there is no constitutional right to jury trial in a direct condemnation action brought by the United States."); Pet. App. 8. Because the decision in this case is unlikely to affect the manner in which either eminent domain or inverse condemnation actions involving the federal government are tried, the United States takes no position on the question whether the instant suit was properly submitted to a jury.

buckwheat, the natural habitat of the Smith's Blue Butterfly (*ibid.*), a species listed as endangered under Section 4 of the ESA, 16 U.S.C. 1533. See 50 C.F.R. 17.11; 41 Fed. Reg. 22,041 (1976).

In 1981, Ponderosa Homes, the previous owner of the site, sought a permit from petitioner City of Monterey to build a 344-unit residential complex on the property. Pet. App. 3; *Del Monte I*, 920 F.2d at 1502. After denying several development proposals, in 1984 the City Council approved a site plan for 190 residential units, subject to the requirement that Ponderosa satisfy 15 conditions within 18 months. *Id.* at 1502-1503. In late 1984, respondents purchased the property for approximately $3.7 million. Respondents continued to pursue final approval of the permit application for the 190-unit proposal by seeking to satisfy the conditions the City Council had specified. *Id.* at 1504-1506; Pet. App. 3.[2]

[2] Pursuant to Section 7 of the ESA, 16 U.S.C. 1536, the United States Fish and Wildlife Service (FWS) prepared a biological opinion, dated March 22, 1985, concerning the anticipated effects of respondents' proposed development on the Smith's Blue Butterfly. J.A. 66-83; see generally *Bennett* v. *Spear*, 117 S. Ct. 1154, 1159 (1997) (describing preparation of biological opinions). The biological opinion was prepared for the Veterans Administration's Loan Guaranty Division in connection with proposed federal home loan guaranties for veterans wishing to purchase condominiums within the development. See J.A. 66-68. The FWS concluded that the project could be expected to destroy the butterfly's habitat at the site of the development, but the agency was "unable to conclude that loss of the * * * site will threaten the survival and recovery of the species as a whole." J.A. 78. The FWS expressed the view that respondents' proposed restoration plan for the site "has little chance for long term success." *Ibid*. The FWS also anticipated that some "takings" (see 16 U.S.C. 1538, 1539; *Babbitt* v. *Sweet Home Chapter of Communities*, 515 U.S. 687, 699 (1995)) of the butterfly would occur, but that "given the present circumstances, numerical losses will be small and of little consequence to the species as a whole." J.A. 81. In addition, the FWS "recommend[ed]," without purporting to require, that "the project be redesigned to preserve at

In June 1986, the City denied respondents' permit application for the proposed development. A resolution adopted by the City Council gave six reasons for its denial of the application. See *Del Monte I*, 920 F.2d at 1504-1505. The resolution explained that the project was expected to have significant adverse environmental impacts, including injury to the habitat of the Smith's Blue Butterfly. *Ibid.* The City also expressed concern that the design for the project did not provide adequate access to and from the property. *Id.* at 1504.

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least the larger colonies of host buckwheat in the east corner of the property." J.A. 81-82. See also J.A. 150-152 (FWS letter, in response to inquiry from Sierra Club, reiterating views previously stated in biological opinion).

If respondents' development were proposed today, it might be addressed differently under the ESA. First, in the biological opinion issued by the FWS in 1985 concerning respondents' property, the discussion of the FWS's misgivings about the proposed restoration plan followed immediately after the explanation of the FWS's conclusion that the development would not be likely to jeopardize the continued existence of the butterfly. Under regulations issued in 1986 (see 51 Fed. Reg. 19,926) to govern the Section 7 consultation process, such advisory, non-binding recommendations would be included in a separately entitled section of the document and would be clearly identified as advisory. See 50 C.F.R. 402.14(j).

Second, the FWS's stated expectation that development of the property would "take" butterflies might lead the developer itself to seek a permit from the FWS under Section 10(a)(1)(B) of the ESA, 16 U.S.C. 1539(a)(1)(B), to allow incidental take of the butterfly according to the terms of an approved conservation plan. See *Sweet Home*, 515 U.S. at 700-701, 707-708. We have been informed by the Department of the Interior that although the incidental take permit provision was added to the ESA in 1982, it was little used until after 1994, when the FWS and the National Marine Fisheries Service (which has ESA responsibility for marine species) issued the "no surprises" policy to provide greater certainty to holders of incidental take permits. That policy was subsequently codified by regulation. See 63 Fed. Reg. 8859 (1998).

2. Respondents filed suit in federal district court pursuant to 42 U.S.C. 1983. They alleged, *inter alia*, that the permit denial violated their rights under the Just Compensation Clause of the Fifth Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The district court dismissed the takings claim as unripe (see *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172 (1985); *Suitum* v. *Tahoe Regional Planning Agency*, 117 S. Ct. 1659, 1664-1667 (1997)), and it dismissed the remaining claims as both unripe and inadequately stated. See *Del Monte I*, 920 F.2d at 1499.

The court of appeals reversed and remanded for further proceedings. *Del Monte I*, 920 F.2d at 1509. The court concluded that further participation by respondents in the permit application process would be futile, thereby satisfying the "final decision" prong of the *Williamson County* ripeness doctrine. *Id.* at 1501-1506. The court acknowledged that a takings claim is ordinarily unripe under *Williamson County* until the property owner has also sought, and been denied, an opportunity to obtain just compensation. *Ibid.* It held, however, that respondents' claim nevertheless was ripe because, under California law, no mechanism for seeking compensation for a regulatory taking had been available at the time respondents' permit application was finally denied. *Id.* at 1506-1507. The court also reversed the district court's dismissal of respondents' due process and equal protection claims, concluding that the evidence was sufficient to raise a triable issue as to whether the denial of respondents' permit application was arbitrary and irrational. *Id.* at 1508-1509.

In 1991, after the case was remanded to the district court, the State of California purchased the property from respondents for $4.5 million, $800,000 more than respondents had paid for the site in 1984. Pet. App. 21. The case thereafter proceeded to trial in the district

court. The court determined that it would decide respondents' substantive due process claim, but that the takings and equal protection claims would be tried to a jury. *Id.* at 3, 32-34.

On the takings claim, the court instructed the jury that it should find for respondents if the permit denial either (1) deprived respondents of "all economically viable use of the property" or (2) "did not substantially advance a legitimate public purpose." J.A. 303. The court explained that "[i]n order to find that the plaintiff has been denied all economically viable use of the property, there must be a showing that after the action of the City that is being challenged here, the property is left with no remaining significant value." J.A. 304. The court also stated that "[t]he regulatory actions of the City or any agency substantially advance[] a legitimate public purpose if the action bears a reasonable relationship to that objective." *Ibid.* The jury found in favor of respondents on both their takings and equal protection claims, and it awarded respondents $1,450,000. Pet. App. 3.

After trial, the district court ruled for petitioner on the substantive due process claim, finding that the permit was denied "for valid regulatory reasons." Pet. App. 41. The court concluded that "the quantity of time and money invested by the [city staff] * * * is demonstrative of conduct which is not arbitrary and irrational, but was for valid purposes." *Id.* at 41-42. The court found that the evidence before the City was in conflict, and that "there were differences of opinion" regarding the effect of the proposed development on the Smith's Blue Butterfly and its habitat. *Id.* at 42. The court concluded that "the City Council was not acting arbitrar[il]y and irrationally in [denying the permit], it was acting for valid regulatory reasons and not attempting to forestall all reasonable development." *Id.* at 43. With respect to the takings and equal protection claims, however, the court entered judg-

ment on the jury's verdict and denied petitioner's motions for judgment as a matter of law and for a new trial. *Id.* at 3-4.

3. The court of appeals affirmed. Pet. App. 1-29.

A. The court first held that 42 U.S.C. 1983 afforded respondents a right to jury trial on their takings claim. The court determined that respondents' inverse condemnation suit was analogous to various forms of actions at law, including eminent domain actions brought by the government, suits for trespass, and actions to recover damages for conversion of personal property. Pet. App. 8-9. The court stated as well that respondents "seek[] compensatory or 'legal' damages." *Id.* at 9. The court of appeals also concluded that both theories of liability—denial of economically viable use and failure to substantially advance a legitimate purpose—presented essentially factual issues appropriate for jury resolution. *Id.* at 10-15.

B. The court of appeals also held that a reasonable jury could have found for respondents on both theories of takings liability. The court stated that "[e]ven if the City had a legitimate interest in denying [respondents'] development application, its action must be 'roughly proportional' to furthering that interest." Pet. App. 16 (citing *Dolan* v. *City of Tigard*, 512 U.S. 374, 391 (1994)). It observed that respondents had presented evidence calling into question each of the six reasons (see p. 4, *supra*) given to support petitioner's denial of their permit application. Pet. App. 17-19. Asserting that "[t]he jury was entitled to credit [respondents'] experts, and discredit the City's testimony," *id.* at 18, the court held (*id.* at 19-20) that a rational juror could have concluded that the denial of respondents' permit application lacked a sufficient nexus with the City's stated objectives.

The court of appeals likewise held that the jury reasonably could have found that petitioner had deprived respondents of all economically viable use of the property.

The court rejected petitioner's argument that the subsequent sale of the property to the State for $4.5 million—$800,000 more than respondents had paid for the land—necessarily established that some economically viable use remained. Pet. App. 21-23. The court also rejected petitioner's contention that because respondents had failed to submit an application proposing a less extensive development, the jury could not reasonably have found a denial of all economically viable use. The court stated that the evidence, viewed in the light most favorable to respondents, supported a finding that any further development application would have been futile. *Id.* at 26.[3]

SUMMARY OF ARGUMENT

A. The "rough proportionality" standard announced by this Court in *Dolan* v. *City of Tigard*, 512 U.S. 374, 391 (1994), is inapplicable to the instant case. That standard applies only where a governmental body's approval of private development is conditioned on a dedication of property; it does not apply to regulation that simply restricts the owner's use of his own land. Both *Dolan* and its predecessor, *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987), rest on the premise that a permanent physical occupation of real property is different in kind from other forms of land-use regulation. The court of appeals therefore erred in holding that the denial of respondents' permit application must be "roughly proportional" to the City's various environmental and other concerns.

B. The court of appeals also erred in holding that the existence of conflicting evidence as to the likely effects of respondents' development proposal provided a basis for

[3] The court of appeals also rejected petitioner's challenge to the amount of damages awarded by the jury. Pet. App. 27-29. Because the court affirmed the damages award on the takings claim, it declined to address petitioner's challenges to the jury's verdict on the equal protection claim. *Id.* at 6.

affirming the jury's determination that a taking had occurred. The jury was instructed that it could find for respondents on their takings claim if it concluded that the permit denial bore no reasonable relationship to a legitimate governmental objective. In affirming the district court's denial of petitioner's motion for judgment notwithstanding the verdict, the court of appeals emphasized that the record contained conflicting evidence regarding the validity of the City's environmental concerns. Contrary to the court of appeals' analysis, however, the existence of conflicting evidence would not authorize the jury to determine for itself whether the proposed development would have had unacceptable environmental or other consequences; rather, it would compel the conclusion that the City had a rational basis for denying the permit application. Moreover, under established principles, the determination whether legislative or administrative bodies have acted reasonably is a question of law subject to de novo review in the court of appeals, not a question of fact subject to deferential review.

C. This Court has stated in dictum that land-use regulation may effect a taking if it does not substantially advance a legitimate governmental purpose. We believe, however, that that dictum is ultimately irreconcilable with the principles underlying this Court's regulatory takings jurisprudence. The fundamental justification for treating land-use regulation as a taking is, and has always been, that certain forms of regulation have (for the owner) the same practical consequences as a direct appropriation. Requiring compensation in such cases ensures that the costs of legitimate public programs will not be unfairly concentrated on discrete individuals. That justification does not apply to land-use restrictions that are objectionable only because they bear no reasonable relationship to a legitimate public purpose. Such restrictions violate principles of substantive due process, but they do not

effect a taking, and they do not trigger a constitutional obligation to provide compensation for losses suffered during the period that the restrictions remain in effect.

ARGUMENT

THE COURT OF APPEALS APPLIED INCORRECT LEGAL STANDARDS IN AFFIRMING THE DISTRICT COURT'S JUDGMENT ON RESPONDENTS' TAKINGS CLAIM

A. The "Rough Proportionality" Test Announced By This Court In *Dolan* v. *City Of Tigard* Is Inapplicable To Land-Use Restrictions Not Involving Compelled Dedications Of Property

The court of appeals in this case "assume[d] that the City's stated interests of protecting the environment and health and safety of its citizens were legitimate." Pet. App. 16. It stated, however, that "[e]ven if the City had a legitimate interest in denying [respondents'] development application, its action must be 'roughly proportional' to furthering that interest." *Ibid.* (citing *Dolan* v. *City of Tigard*, 512 U.S. 374, 391 (1994)). The court of appeals erred in invoking the "rough proportionality" standard in this case.[4] This Court's decisions make clear that the "rough proportionality" standard applies only where land-use regulation involves a compelled dedication of real property.

1. The Court's identification of the distinct nature of compelled dedications finds its roots in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), in which the Court analyzed the relevant precedents and "conclude[d] that a permanent physical occupation authorized by government is a taking without

[4] Indeed, because the jury was not instructed to apply a "rough proportionality" standard (see J.A. 302-305), it does not appear that such a basis for a taking claim was properly before the court of appeals.

regard to the public interests that it may serve." The Court observed that "[i]n such a case, the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation." *Id.* at 441. The Court emphasized, however, that its holding was "very narrow," and that it "d[id] not * * * question the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's *use* of his property." *Ibid.*

In *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), the California Coastal Commission conditioned approval of new beachfront construction on the landowner's agreement to provide a public easement across the property. *Id.* at 828-829. Relying principally on *Loretto*, the Court began its analysis by observing that such an easement requirement, if imposed unilaterally by the State, would have effected a taking of property requiring the payment of just compensation. *Id.* at 831. It then addressed the question whether the requirement of public access could nonetheless be made a condition of a permit for further development. The Court held that where a permit denial would advance a legitimate government purpose and would not itself constitute a taking, the permit may be conditioned on a dedication of property that serves the same purpose. *Id.* at 835-837. Where such a permit condition fails to advance the same purpose as the denial, however, "the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was." *Id.* at 837. The purpose becomes the acquisition of an easement without the payment of compensation, an impermissible result under the Just Compensation Clause. *Ibid.*

Finally, in *Dolan*, the Court further clarified the nature of the showing that a regulatory body must make in order

to require the dedication of land as a condition of a development permit. The landowner in that case applied for a municipal permit to expand her plumbing and electric supply store. As a condition of the permit, the City of Tigard required her to dedicate a portion of her property to the city for use as a public greenway and pathway for bicycles and pedestrians. 512 U.S. at 379-380. The Court observed that "[w]ithout question, had the city simply required petitioner to dedicate a strip of land * * * for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred." *Id.* at 384. It held that to avoid takings liability, the City was required to show that the extent of the required dedication was roughly proportional to the expected adverse impact of the proposed development. *Id.* at 388-391.

The *Dolan* Court acknowledged that "the authority of state and local governments to engage in land use planning has been sustained against constitutional challenge as long ago as * * * *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926)." 512 U.S. at 384. The Court distinguished zoning and other land-use restrictions from the dedication requirement imposed by the City of Tigard, explaining that "the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city." *Id.* at 385. The Court emphasized that such public access requirements deprive the owner "of the right to exclude others, 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Id.* at 384 (quoting *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979)).[5]

[5] The Court in *Dolan* also relied in part on "the well-settled doctrine of 'unconstitutional conditions.'" 512 U.S. at 385. As its name suggests, that doctrine applies only where the government makes available a discretionary benefit, subject to a condition that the Constitution would prohibit the government from imposing unilaterally. It has no application to an outright denial of a land-use permit.

2. Thus, *Dolan*, like *Nollan*, rests on the view that compelled dedications of property to the public warrant closer judicial scrutiny than do restrictions on the owner's use of her land, even where the dedications are made a condition of other development rather than imposed unilaterally by governmental authorities, as in *Loretto*. The Court in *Nollan* observed that judicial scrutiny of land-use regulation should be particularly searching "where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective." 483 U.S. at 841.[6] Similarly, *Dolan* derived its proportionality test from the analysis used by some state courts to determine whether a dedication "is merely being used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit." *Dolan*, 512 U.S. at 390 (quoting *Simpson* v. *North Platte*, 292 N.W.2d 297, 301 (Neb. 1980)). With respect to land-use regulation that does not involve a compelled dedication, however, neither *Nollan* nor *Dolan* purports to curtail the "broad power" of governmental bodies "to impose appropriate restrictions upon an owner's *use* of his property." *Loretto*, 458 U.S. at 441.[7]

[6] See also Frank Michelman, *Takings, 1987*, 88 Colum. L. Rev. 1600, 1608-1609 (1988) (*Nollan* is limited to government-compelled permanent occupations of property, a reading that "fully explain[s] the opinion and its result, without, implausibly, turning *Nollan* into *Lochner redivivus*.").

[7] With the exception of the court of appeals in the instant case, virtually every lower federal court to consider the issue has held that *Dolan*'s "rough proportionality" test is inapplicable to land-use

Nor would it make any sense to transplant the *Dolan* approach to the quite different setting of ordinary land-use regulation. The court of appeals made no real effort to explain how a court (let alone a jury) should determine whether denial of a development permit is "roughly proportional" to a municipality's environmental and other concerns. Especially where the government acts in response to *cumulative* risks posed by the use of property by more than one owner, it would often be difficult or impossible to quantify with any precision the marginal risk posed by a specific project. In other situations, regulation of the development of a single parcel may serve a variety of purposes, such as alleviating traffic congestion, protecting against flooding or mudslides, ensuring compliance with clean water standards, preserving habitat

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restrictions not involving compelled dedications of property. See, *e.g.*, *New Port Largo, Inc.* v. *Monroe County*, 95 F.3d 1084, 1088 (11th Cir. 1996) (*Dolan* and *Nollan* are irrelevant to a takings challenge to a land-use restriction that does not compel a dedication of property for public use), cert. denied, 117 S. Ct. 2514 (1997); *Goss* v. *City of Little Rock*, 90 F.3d 306, 308-310 (8th Cir. 1996) (while *Dolan*'s rough proportionality test applies to a permit condition that compels a dedication of property, permit denials and other traditional land-use regulation warrant a more deferential standard of review); *Clajon Prod. Corp.* v. *Petera*, 70 F.3d 1566, 1579 (10th Cir. 1995) ("the 'essential nexus' and 'rough proportionality' tests [from *Nollan* and *Dolan*] are properly limited to the context of development exactions"); *Marshall* v. *Board of County Comm'rs for Johnson County*, 912 F. Supp. 1456, 1472-1474 (D. Wyo. 1996); *Harris* v. *City of Wichita*, 862 F. Supp. 287, 293-294 (D. Kan. 1994), aff'd, 74 F.3d 1249 (10th Cir. 1996) (Table). But see *Unity Real Estate Co.* v. *Hudson*, 889 F. Supp. 818, 840 (W.D. Pa. 1995). State court decisions are largely in accord with the prevailing view in the federal courts. See, *e.g.*, *Landgate, Inc.* v. *California Coastal Comm'n*, No. S059847, 1998 WL 214431, at *10 (Cal. Apr. 30, 1998); *Home Builders Ass'n* v. *City of Scottsdale*, 930 P.2d 993, 1000 (Ariz.) (in banc), cert. denied, 117 S. Ct. 2512 (1997); *McCarthy* v. *City of Leawood*, 894 P.2d 836, 845 (Kan. 1995); *Arcadia Dev. Corp.* v. *City of Bloomington*, 552 N.W.2d 281, 286 (Minn. Ct. App. 1996).

for endangered species, and promoting (through density and other limitations) the amenities necessary for the community that will remain after the developer completes its work. It would be equally impossible in such a situation to ascertain whether each of numerous (and often overlapping) restrictions was roughly proportional to cumulative harms on a single parcel.

Because the court of appeals did not attempt to explain how a rough proportionality standard could be sensibly implemented by land-use agencies or courts in this quite different setting, the practical import of the court's analysis is not altogether clear. It threatens, however, to be quite disruptive of long-accepted practices in land-use regulation. There is no justification in Fifth Amendment jurisprudence for imposing such a limitation on the flexibility of local governments in addressing health, safety, and environmental concerns. The evident purpose of *Nollan* and *Dolan* was to ensure that development restrictions involving compelled dedications of property are subjected to closer judicial scrutiny than other land-use regulation. Invocation of the "rough proportionality" standard to the instant case therefore stands the reasoning of *Nollan* and *Dolan* on its head.

B. The Court Of Appeals Erred In Holding That The Existence Of Conflicting Evidence Before Municipal Regulators Provided A Basis For Finding That A Taking Had Occurred

The district court instructed the jury that it could find for respondents on their takings claim if the permit denial "did not substantially advance a legitimate public purpose." J.A. 303. The court explained that "[t]he regulatory actions of the City or any agency substantially advance[] a legitimate public purpose if the action bears a reasonable relationship to that objective." J.A. 304. In affirming the district court's denial of petitioner's motion

for judgment notwithstanding the verdict, the court of appeals emphasized that the record contained conflicting evidence regarding the validity of the City's environmental concerns. See Pet. App. 17-20. The court of appeals reasoned that "[t]he jury was entitled to credit [respondents'] experts, and discredit the City's testimony." *Id.* at 18. It then concluded (*id.* at 19-20):

> In light of the evidence proffered by [respondents], the City has incorrectly argued that no rational juror could conclude that the City's denial of [respondents'] application lacked a sufficient nexus with its stated objectives. Significant evidence supports [respondents'] claim that the City's actions were disproportional to both the nature and extent of the impact of the proposed development.

That approach fundamentally misconceives the roles of both trial and appellate courts in reviewing the reasonableness of governmental action. Review for rationality does not entail resolution of credibility disputes or reweighing of the evidence that was before the governmental body that issued the challenged decision. Moreover, the ultimate determination as to the rationality of the challenged decision is a determination of law subject to de novo review. The court of appeals itself therefore should have determined, as a matter of law, whether denial of respondents' permit application was reasonable in light of the evidence before the City at the time of its decision.[8]

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[8] As we explain in Part C, *infra*, whether land-use regulation reasonably furthers legitimate governmental purposes should be deemed irrelevant to the determination whether a taking has occurred—as distinguished from whether the taking, if one occurred, was for a "public use." For the reasons stated in this Part, however, the court of appeals' disposition of this case was erroneous even assuming (consistent with the jury instructions given by the district court) that such an inquiry is properly a part of the taking analysis.

1. In a variety of contexts, courts are called upon to assess the rationality of regulatory measures adopted either by the federal government, or by the States or their political subdivisions. Pursuant to the Administrative Procedure Act, a reviewing court may determine whether agency action is "arbitrary [or] capricious," 5 U.S.C. 706(2)(A), or "unsupported by substantial evidence," 5 U.S.C. 706(2)(E). In resolving challenges to economic regulation based upon the Due Process Clause of the Fifth or Fourteenth Amendment, a court must ask whether "the legislature has acted in an arbitrary or irrational way." *Concrete Pipe & Prods. of Cal., Inc.* v. *Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 637 (1993). The court's review under the Equal Protection Clause is similarly deferential: "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

The hallmark of any form of rationality or reasonableness review is that a legislative or administrative determination may not be overturned simply because the court reweighs the relevant evidence and concludes that a different decision would have been preferable. See, *e.g.*, *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990) (rule adopted by the National Labor Relations Board may be upheld as rational even if Members of the Court would have preferred a different rule); *Allentown Mack Sales and Serv., Inc.* v. *NLRB*, 118 S. Ct. 818, 829 (1998) ("substantial evidence" standard "gives the agency the benefit of the doubt, since it requires not the degree of evidence which satisfies the *court* that the requisite fact exists, but merely the degree that *could* satisfy a

reasonable factfinder"); *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 n.1 (1992) (to reverse decision agency under substantial evidence test, court "must find that the evidence not only *supports* that conclusion, but *compels* it"); *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 154 (1938) (judicial inquiry in substantive due process challenge "must be restricted to the issue whether any state of facts either known or which reasonably could be assumed affords support for" the legislative judgment, and "neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for" the legislative determination); *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) ("Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation [under the Equal Protection Clause] merely by tendering evidence in court that the legislature was mistaken.").

The court of appeals' analysis cannot be reconciled with those principles. The court held that the jury's verdict in this case could legitimately be based on a decision "to credit [respondents'] experts, and discredit the City's testimony." Pet. App. 18. Under established administrative law principles, however, the existence of conflicting evidence does not entitle the reviewing court to decide for itself on which side the evidence preponderates; its role is limited to determining whether the agency could reasonably have chosen the course that it did. Even assuming that respondents' takings claim was properly submitted to the jury, nothing in the Seventh Amendment or in 42 U.S.C. 1983 gives the jury a more sweeping power than a court might have exercised.[9]

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[9] Application of the foregoing principles in this case is complicated somewhat by the fact that the evidence placed before the jury was not limited to the administrative record underlying the City's decision to deny the development permit, but included the testimony of expert witnesses introduced by both parties. The fact remains, however, that the question placed before the jury was whether the City's decision bore a reasonable relationship to a legitimate governmental objective. The experts who testified at trial had previously expressed their views to the City Council during the permit application process; the purpose of their testimony was simply to explicate for the jury the nature of the evidence that was before the Council at the time it made its decision. The use of live testimony to supplement the documentary record in that respect did not authorize the jury to reject the City's decision as unreasonable simply because it found the evidence supporting respondents' permit application to be more persuasive than the evidence on the other side.

2. The court of appeals' analysis is subject to a second, and related, criticism. Whether a court's review is based upon the APA or upon the Due Process or Equal Protection Clause, the question whether an agency decision is arbitrary, unreasonable, or unsupported by substantial evidence is a question of law subject to de novo review. See, *e.g.*, *Athens Community Hosp., Inc.* v. *Shalala*, 21 F.3d 1176, 1178 (D.C. Cir. 1994) ("Upon the issue whether an administrative regulation is lawful, we do not defer to the judgment of the district court"; rather, the court of appeals "determine[s] de novo whether the agency's decision was arbitrary or capricious."); *Novicki* v. *Cook*, 946 F.2d 938, 941 (D.C. Cir. 1991) ("We do not defer to a district court's review of an agency adjudication any more than the Supreme Court defers to a court of appeals' review of such a decision."); *Smolen* v. *Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996) ("We review the district court[']s decision *de novo* and therefore must independently determine whether the [agency's] decision (1) is free of legal error and (2) is supported by substantial evidence.").

The district court instructed the jury that "[t]he regulatory actions of the city or any agency substantially advance[] a legitimate public purpose if the action bears a reasonable relationship to that objective." Pet. App. 13. If

the district court had itself determined that the permit denial lacked a "reasonable relationship" to the City's environmental concerns, and had ruled in respondents' favor on that basis, its decision would have been subject to de novo review in the court of appeals. There is no logical basis for reviewing a comparable jury verdict under a more deferential standard. The court of appeals, however, sustained the jury's verdict based on its determination that "[s]ignificant evidence supports [respondents'] claim," and that a "rational juror could conclude that the City's denial of [respondents'] application lacked a sufficient nexus with its stated objectives." *Id.* at 20. In so holding, the court of appeals abdicated its responsibility to determine, as a matter of law, whether the City's denial of respondents' permit application satisfied the (deferential) standard embodied in the jury instructions.[10]

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[10] As we explain above, see note 1, *supra*, the United States takes no position on the question whether the liability issues in this case were properly submitted to the jury. We do note, however, that it would be anomalous to submit to a jury a determination of the sort that would be subject to de novo review in the court of appeals. Determinations regarding the reasonableness of decisions made by governmental bodies are, moreover, routinely entrusted to federal judges. (Indeed, the district court in the instant case reserved for itself the question whether the City's denial of respondents' permit application violated principles of substantive due process. See Pet. App. 41-42.) And because such determinations do not properly entail the resolution of credibility disputes or the reweighing of evidence considered by the governmental body whose decision is under review, they do not implicate the traditional strengths of juries. Thus, assuming (contrary to our position, see Part C, *infra*) that takings liability can correctly be premised on a finding that land-use regulation does not reasonably relate to legitimate state interests, the essentially legal character of the reasonableness inquiry, and the greater experience of judges at undertaking such an analysis, would weigh against submission of that issue to a jury. Cf. *Markman* v. *Westview Instruments, Inc.*, 517 U.S. 370, 388 (1996).

C. A Determination That Land-Use Regulation Fails Substantially To Advance A Legitimate Governmental Interest Does Not Provide A Sufficient Basis For Concluding That A Compensable Taking Of Property Has Occurred

The jury in the instant case was instructed that respondents could establish a compensable taking if they proved "that the City's decision to reject [respondents'] 190 unit development proposal did not substantially advance a legitimate public purpose." J.A. 303. That instruction is consistent with this Court's statement in *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980), that

> [t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow* v. *Cambridge*, 277 U.S. 183, 188 (1928), or denies an owner economically viable use of his land, see *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 138, n. 36 (1978).

447 U.S. at 260. We believe, however, that the language quoted above may properly be regarded as dictum, and that it is unfounded insofar as it suggests that land-use regulation may be deemed a taking that requires the payment of just compensation if it fails substantially to further a legitimate governmental objective.[11]

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[11] The *Agins* Court's articulation of the governing constitutional standard may properly be characterized as dictum, since the Court concluded that the challenged zoning ordinances *did* "substantially advance legitimate governmental goals." 447 U.S. at 261. The landowners in *Agins* did not seriously contend that the challenged zoning restriction failed to advance a legitimate state interest. See Br. for Appellants 17 n.5 (No. 79-602) ("that the City of Tiburon may take private property for public use, and that open space is one species of such legislatively declared public use, cannot be the subject of rational debate in the case at bench"). It is also of significance to the issue

1. The *Agins* Court did not identify any basis in the Just Compensation Clause itself, or in that Clause's background or subsequent application, for the statement quoted above. Instead, it simply relied on this Court's statement in *Nectow* that a restriction on private development adopted as part of a municipal zoning plan generally "cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare." 277 U.S. at 188 (citing *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 395 (1926)). *Nectow*, however, did not involve a claim under the Just Compensation

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discussed in Part B, *supra*, that the Court reached its conclusion on this point solely by reference to the applicable state law and local ordinances, without consideration of factual issues of the sort the jury was allowed to consider in this case.

This Court has quoted the *Agins* passage in some subsequent opinions. See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985); *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 485 (1987); *Nollan*, 483 U.S. at 834 & n.3, 841; *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992); *Dolan*, 512 U.S. at 385. In no case, however, has the Court found a compensable taking based on its conclusion that land-use regulation did not substantially advance a legitimate state interest. Indeed, eight years after this Court's decision in *Agins*, the Claims Court stated that "no court has ever found that a taking has occurred solely because a legitimate state interest was not substantially advanced." *Loveladies Harbor, Inc.* v. *United States*, 15 Cl. Ct. 381, 390 (1988). We are aware of only one subsequent decision in which a court has entered an award of just compensation on that basis. See *Whitehead Oil Co.* v. *City of Lincoln*, 515 N.W.2d 401, 408-412 (Neb. 1994).

Nollan and *Dolan* are not to the contrary. As we explain above (see pp. 11-15, *supra*), both those cases rest on the proposition that compelled dedications of property require a greater justification than do regulatory measures that simply restrict the owner's use of land. Because the analysis articulated in those cases requires a comparison between the compelled dedication and the anticipated effects of proposed development, that test has no application to cases that do not involve a dedication requirement.

Clause. Rather, the plaintiff in that case contended that the zoning regime "deprived him of his property without due process of law in contravention of the Fourteenth Amendment." *Id.* at 185. In setting forth the legal principles governing its review, the *Nectow* Court observed that

> a court should not set aside the determination of public officers in such a matter unless it is clear that their action "has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense."

Id. at 187-188 (quoting *Euclid*, 272 U.S. at 395).

Thus, the *Nectow* Court's use of the word "substantial" cannot properly be read to suggest that a more stringent means-ends inquiry is appropriate when land-use regulation is challenged under the Just Compensation Clause than when it is alleged to effect a denial of substantive due process. That is so both because *Nectow* did not involve a claim under the Just Compensation Clause, and because the *Nectow* Court used the phrase "substantial relation" in contradistinction to "a mere arbitrary or irrational exercise of power."[12] Because the *Agins* Court's use of the phrase "substantially advance" was supported only by citation to *Nectow*, *Agins* should not be read to have approved a new, and more demanding, standard governing the adjudication of takings claims. Rather, read in its proper context, *Agins* simply suggests that land-use regulation so arbitrary or irrational as to constitute a violation of substantive due process principles may be found, on that

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[12] Compare J.A. 304 (district court instructed the jury in this case that "[t]he regulatory actions of the city or any agency substantially advance[] a legitimate public purpose if the action bears a reasonable relationship to that objective").

basis, to effect a taking of property as well.[13] In our view, however, that suggestion is incorrect.

2. Although the passage in *Agins* quoted above has been repeated in several of this Court's subsequent decisions, it is ultimately irreconcilable with the principles underlying the Court's regulatory takings jurisprudence. As this Court recognized in *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992), "early constitutional theorists did not believe the Takings Clause embraced regulations of property at all." Rather, until the Court's decision in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922), "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession.'" *Lucas*, 505 U.S. at 1014 (citations omitted). This Court has since concluded, however, that even where an owner is not divested of title to or possession of real property, land-use regulation may effect a taking if it trenches too severely upon the prerogatives that have traditionally accompanied ownership. See *id.* at 1014-1019. Thus, regulation that entails a permanent physical occupation of real property, see *Dolan*, 512 U.S. at 384; *Nollan*, 483 U.S. at 831-832; *Loretto*, 458 U.S. at 426, 434-435, 441, or that deprives the owner of all economically beneficial use of the land, see *Lucas*, 505 U.S. at 1015-1016, typically requires the payment of just compensation even though it does not involve a "direct appropriation" of the property involved.

[13] Relying on *Agins*'s use of the phrase "substantially advance," the Court in *Nollan* suggested that takings analysis might involve a more searching means-ends inquiry than is properly undertaken pursuant to the Due Process Clause. The Court stated that "there is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical." 483 U.S. at 835 n.3. The Court has more recently reiterated, however, that where "due process arguments are unavailing, 'it would be surprising indeed to discover' the challenged statute nonetheless violated the Takings Clause." *Concrete Pipe*, 508 U.S. at 641.

In any event, our argument is not that takings and due process challenges to land-use regulation are governed by "identical" standards. A regulation that deprives the owner of all economically beneficial use of land may constitute a taking even where it satisfies due process review. Our point is simply that where land-use regulation satisfies due process standards, it may not be deemed a taking, requiring the payment of compensation, based on a purportedly insufficient nexus between the governmental interest to be furthered and the means employed to advance that interest.

But while a direct appropriation is not a *sine qua non* of a compensable taking, it remains the point of reference for determining whether there is a taking requiring the payment of compensation. That point of reference is evident in *Mahon* itself, the Court's seminal decision concerning the application of the Just Compensation Clause to regulation of the use of real property. In *Mahon*, the Court explained that "[t]o make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." 260 U.S. at 414. In *Loretto*, the Court observed that a permanent physical occupation "is perhaps the most serious form of invasion of an owner's property interests," one that "forever denies the owner any power to control the use of the property" that is occupied. 458 U.S. at 435, 436. In *Williamson County Regional Planning Commission* v. *Hamilton Bank of Johnson City*, 473 U.S. 172, 185 (1985), the Court recognized that "government regulation may be so restrictive that it denies a property owner all reasonable beneficial use of its property, and thus has the same effect as an appropriation of the property for public use." See also *id.* at 199 (in determining whether regulatory measures go "too far," the court's task is "to distinguish the point at which regu-

lation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession"). And the *Lucas* Court noted that "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." 505 U.S. at 1017.

The Court's regulatory takings jurisprudence thus reflects a determination that certain forms of land-use regulation are, from the owner's perspective, sufficiently similar to the direct appropriation of property as to trigger the Fifth Amendment requirement that just compensation be paid. By contrast, regulation that involves neither a physical occupation nor a denial of all economically beneficial use, and is objectionable only because it fails to advance a legitimate governmental interest, cannot plausibly be regarded as the functional equivalent of a direct appropriation of land.

3. The purpose of the Just Compensation Clause is not to protect property owners against regulation that serves no legitimate governmental purpose. To the contrary, the Clause by its terms "presupposes that [property] is wanted for public use." *Mahon*, 260 U.S. at 415; see also *Hawaii Housing Auth.* v. *Midkiff*, 467 U.S. 229, 239-245 (1984).[14] The Just Compensation Clause "does not prohibit

[14] The Court in *Midkiff* reiterated the established rule that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." 467 U.S. at 241 (quoting *Thompson* v. *Consolidated Gas Util. Corp.*, 300 U.S. 55, 80 (1937)). The Court in *Midkiff* defined the "public use" requirement in a manner that essentially duplicates the standard applicable to substantive due process claims, observing that "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." 467 U.S. at 241; see also *id.* at 240 ("The 'public use' requirement is thus coterminous with

the taking of private property, but instead places a condition on the exercise of that power. * * * [I]t is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church* v. *Los Angeles County*, 482 U.S. 304, 314-315 (1987).

Thus, the constitutional requirement that just compensation be paid in order for a taking to be lawful is not intended to prevent or deter the government from adopting irrational regulatory schemes. Rather, the just compensation requirement addresses the quite different concern that the costs of *legitimate* public programs not be concentrated unfairly on discrete individuals. See, *e.g.*, *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960) (just compensation requirement "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"); *Kirby Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 14 (1984).[15] In determining

the scope of a sovereign's police powers."); *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1014-1016 & n.18 (1984).

[15] For that reason, the court of appeals erred, in the course of analyzing the jury trial issue, in analogizing eminent domain and inverse condemnation actions to suits based on trespass or conversion. See Pet. App. 9. Those actions sound in *tort*, and any resulting money judgment takes the form of damages to compensate for injury sustained as the result of wrongful conduct. The Federal Tort Claims Act specifically exempts the United States from monetary liability under that Act based on "the execution of a statute or regulation, whether or not such statute or regulation be valid." 28 U.S.C. 2680(a). As the Court explained in *United States* v. *Varig Airlines*, 467 U.S. 797 (1984), that provision was adopted because "[i]t is neither desirable nor intended that the constitutionality of legislation [or] the legality of regulations * * * should be tested through the medium of a damage suit for tort." *Id.* at 809-810 (citation omitted).

whether particular regulatory measures effect a taking of property, this Court has accordingly looked principally to the nature of the burden placed upon individual landowners. Where the burden is functionally comparable to that attendant upon a direct appropriation of property, the Court has held that just compensation is required in order for the regulation to be lawful. See pp. 24-26, *supra*. By contrast, a claim that government regulation fails substantially to advance legitimate state interests has no logical relevance to the question whether the burdens of that regulation have been unfairly concentrated on parti cular individuals.

4. For the foregoing reasons, land-use regulation that bears no reasonable relationship to any valid governmental purpose violates principles of substantive due process, but it cannot be said (on that basis alone) to effect a compensable taking of property. The significant practical consequences of that distinction result from this Court's decision in *First English*, which recognizes a right to

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The money judgment in an eminent domain or inverse condemnation action, by contrast, is the payment of the compensation that satisfies the condition necessary to render the governmental action lawful. In other words, the payment of compensation results in a lawful transaction in which money is paid in exchange for the government's acquisition of a property interest. An inverse condemnation action therefore is brought to obtain the compensation owed when the legislature is deemed to have authorized the taking of property with compensation to be paid in a judicial proceeding instituted by the property owner (such as in a suit under the Tucker Act, 28 U.S.C. 1491(a)(1)), rather than to have the governmental action enjoined as unauthorized if it is found to constitute a taking that requires the payment of compensation to be lawful. See, *e.g.*, *Ruckelshaus* v. *Monsanto*, 467 U.S. at 1016-1019. An inverse condemnation action has historically sounded in *contract*, not tort, with the obligation to pay in exchange for the acquisition of property implied under the terms of the Fifth Amendment. See, *e.g.*, *Jacobs* v. *United States*, 290 U.S. 13, 16 (1933); compare *Schillinger* v. *United States*, 155 U.S. 163, 167-168 (1894).

compensation for temporary takings in the regulatory context. 482 U.S. at 318-321. With respect to "the relatively rare situations where the government has deprived a landowner of all economically beneficial uses," *Lucas*, 505 U.S. at 1018, the obligation to provide compensation for temporary takings is a fairly manageable one. The potential liability of the federal and state governments will be substantially increased, however, if a finding that land-use restrictions are not reasonably related to a legitimate governmental interest is deemed sufficient, by itself, to trigger the temporary takings principle while the restrictions were in effect.[16] Such a rule would effectively compel the payment of money damages whenever a court holds government land-use regulation to be irrational, even if the economic loss to the owner is slight in comparison to the property's remaining permissible uses. Nothing in the text or purposes of the Just Compensation Clause supports that result.[17]

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[16] The question whether irrational land-use regulation effects a taking is likely, as a general matter, to be of greater practical significance to federal and state governments than to municipalities such as the petitioner in this case. A local government is a "person" subject to suit for damages under 42 U.S.C. 1983. See, *e.g.*, *Monell* v. *New York City Dep't of Social Serv.*, 436 U.S. 658 (1978). Where municipal policymaking officials restrict the use of land in a manner that violates the owner's substantive due process rights, monetary relief will therefore be available, regardless of whether the restriction is also deemed a "taking" within the meaning of the Just Compensation Clause. A State, by contrast, is not a "person" subject to suit under Section 1983, see *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 62-71 (1989), and there is no federal statute generally authorizing suits for damages against the United States in cases involving constitutional violations.

[17] This Court's decision in *First English* cannot plausibly be construed as establishing any overarching principle that retrospective monetary relief must always be made available for losses suffered as a result of unconstitutional government conduct. The Court has recognized, for example, that "[t]he rule that the United States may

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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not be sued without its consent is all embracing," *Lynch* v. *United States*, 292 U.S. 571, 581 (1934), and applies to suits "arising from some violation of rights conferred upon the citizen by the Constitution," *id.* at 582. See also, *e.g.*, *FDIC* v. *Meyer*, 510 U.S. 471, 484-486 (1994); *United States* v. *Hopkins*, 427 U.S. 123, 128 (1976). Even where sovereign entities are not entirely immune from suit, the remedy provided upon proof of a constitutional violation is often limited to prospective injunctive relief. See, *e.g.*, *Papasan* v. *Allain*, 478 U.S. 265, 278 (1986) (Eleventh Amendment bars federal court from awarding relief against state officials that "is tantamount to an award of damages for a past violation of federal law," but does not preclude "relief that serves directly to bring an end to a present violation of federal law"); 5 U.S.C. 702 (APA authorizes suits against federal agencies for "relief other than money damages").